No. 12867

In the United States Court of Appeals for the Ninth Circuit

WESTERN AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

BRIEF FOR RESPONDENT

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CITATIONS

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JURISDICTIONAL STATEMENT

The jurisdiction of the Civil Aeronautics Board to issue the orders under review rests on Sections 205, 401 and 408 of the Civil Aeronautics Act, of 1938, 52 Stat. 973, as amended, 49 U. S. C. 401 *et seq.*, and was invoked by petitions for intervention and reconsideration filed in a proceeding before the Board known as Docket No. 2839 (R. 13, 14, 192, 214, 218, 240). The jurisdiction of this Court to review these orders rests on Section 1006 of the Act (52 Stat. 1024, 49 U. S. C. 646) and was invoked by a petition for review filed April 18, 1951 (R. 875, 883).

COUNTERSTATEMENT OF THE CASE

Petitioner (Western) herein seeks review of two orders of the Civil Aeronautics Board imposing labor protective provisions as a condition to the transfer by Western to United Air Lines of a certificate of public

convenience and necessity for operation between Denver and Los Angeles (Route 68), and of various properties incident thereto. Other than as indicated below, the course of the proceeding before the Board is outlined with substantial accuracy in Western's brief.

The original transfer proceeding before the Board encompassed the issue of whether the Board should condition its approval of the proposed transfer upon the observance by the parties of provisions designed to protect adversely affected employees. The Air Line Pilots Association, an intervenor in the proceeding, specifically requested that protective conditions be imposed for the benefit of the Western pilots assigned to Route 68 (R. 16, 25). A similar request was made by the Brotherhood of Railway and Steamship Clerks on behalf of the Western clerical employees (R. 64–65). Western agreed to submit data at the hearing concerning the effect of the transfer upon employees (R. 21, 31), and a portion of the hearing was devoted to this problem. Western's president testified that, other than as a matter of principle, Western had no objection to the imposing of labor protective conditions (R. 43), but that the matter was "entirely academic because there are not going to be any personnel dropped as the result of route sale" (R. 44).[1] In reliance upon this testimony, the Board failed to condition its initial approval of the transfer, entered on August 25, 1947,

[1] As the purport of Mr. Drinkwater's testimony on this matter is crucial, the testimony is set forth in full as an appendix to this brief (*infra*, p. 25).

on compliance with labor protective conditions. The Board made the following findings (R. 97–98):

> * * * Western's president testified that Western had every intention of retaining the 14 flight crews operating on route No. 68 in the event this transaction is approved and transferring them subject to their seniority. This witness testified that Western would need more than the 14 crews available from the sale of route No. 68 in order to operate the Seattle extension and the Mexico City route. The witness also testified that no employee of Western will be released because of this transaction and that every competent employee in the employment of the company at Grand Junction and Denver will continue with Western, that the company will probably need more employees at Portland and Seattle than it presently employs at Denver and Grand Junction, and that Western will pay the employees' moving expenses. The evidence shows that the question of transfer of pilot personnel was not discussed in the negotiation preceding this transaction, nor was it a condition of the sale. *It is clear from the record that Western's pilots will continue to be employed by Western, retaining their seniority and other rights, and that every other competent employee on route No. 68, who would be retained by the company if this transaction had not been proposed, will continue to be employed by the company with full rights.* Therefore, since there is nothing that would indicate that any of the rights of Western's present employees on route No. 68 will be prejudiced by the acquisition and operation of that route by United, there appears to be no

reason for any condition of the nature urged by the Air Line Pilots Association. [Emphasis supplied.]

On September 4, 1947, *ten days after the initial approval by the Board of the transfer of Route 68,* Western notified 23 of its pilots that new schedules would require their removal from the payroll effective September 19, 1947 (R. 194). *Five days later,* on September 9, 1947, other Western employees were notified by letter that they would be furloughed on September 14, 1941, "due to the disposal of Route 68" (R. 821). Still later, and without knowledge of these facts, the Board on September 11, 1947, issued its supplemental order transferring the certificate for Route 68 to United effective September 15, 1947 (R. 894–903). The effective date of this reissued certificate was that provided for in the agreement between Western and United (R. 12).

On September 24, 1947, within the thirty-day period provided for the filing of petitions for reconsideration of Board orders,[2] the Air Line Pilots Association filed a petition for reconsideration of the Board's initial order of approval (R. 192). The petition alleged in substance that, contrary to Mr. Drinkwater's assurances, Western's pilots were in fact being discharged because of the transfer of Route 68, and requested that labor protective conditions be imposed. The Air Line Mechanics Division, U. A. W.-C. I. O., and the Brotherhood of Railway and Steamship Clerks, who represented Western's

[2] Rule 11 of the Board's Rules of Practice, 14 C. F. R. (1946 Supp.) 285.11.

mechanical and clerical employees, filed similar petitions with the Board (R. 218, 240). On September 29, 1947, Public Counsel recommended that the Board defer passing upon these petitions until the parties had made an effort to reach voluntary arrangements for the protection of Western's displaced employees. And it was recommended that if the parties should fail to agree, the proceeding be reopened for the purpose of determining what employee protective conditions, if any, should be imposed (R. 228).

Pursuant to the foregoing recommendation, the Board determined to make an effort to reach a settlement of the problem without further hearings and by letter of November 5, 1947, so advised the parties. In this letter the Board requested the parties to attend a conference with the Board and to furnish the Board with certain data bearing on the employee issues (R. 810). This conference was held in Washington, D. C., on December 5, 1947. At the close of the conference the Board recommended that the parties reach a voluntary agreement for the protection of adversely affected employees (R. 811). These efforts came to naught because Western would not agree to any basis for employee protection until the adversely affected employees had been individually identified. By letter of March 25, 1948, the Board again urged the parties to reach a voluntary settlement and informed Western that it was the Board's view that the parties should first determine a formula to cover adversely affected employees and that individual identification should be deferred (R. 812–813).

On July 9, 1948, the Brotherhood of Railway and

Steamship Clerks advised the Board that efforts to negotiate an agreement had failed because Western still insisted on individual identification of adversely affected employees. The Brotherhood asserted that by reason of Western's "open defiance" of the Board's recommendation and instructions nothing could be accomplished by any further conferences (R. 814–815).

Thereafter, on August 25, 1948, the Board reopened the proceeding for the purpose of determining whether any employees of Western had been adversely affected as a result of the transfer of Route 68, and if so, whether any employee protective conditions should be attached to the Board's approval of the transfer (R. 245). After completion of customary procedural steps detailed in n. 10, p. 19, *infra,* the Board on July 7, 1950 issued its Opinion and Order No. E–4444 (R. 815) providing for the protection of adversely affected employeees. A clarifying order was subsequently issued on December 29, 1950 (Order No. E–4987, R. 861). Western seeks review of these two latter orders.

STATUTES AND REGULATIONS INVOLVED

Western has set forth as an appendix to its brief the majority of the provisions of the Civil Aeronautics Act of 1938, 52 Stat. 973, as amended, 49 U. S. C. 401 *et seq.* (hereinafter sometimes referred to as the Act), to which references have been made herein. Other pertinent provisions of the Civil Aeronautics Act, the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1001 *et seq.,* and the Board's

Regulations are cited or quoted in their appropriate place in the text of this brief.

QUESTION PRESENTED

1. Is the Board authorized to impose labor protective conditions upon the transfer of a certificate of public convenience and necessity and the air carrier properties connected therewith?

2. Was the Board authorized, subsequent to consummation of the transfer, to make its approval of the transfer conditional upon compliance with labor protective provisions where the initial order of approval had not become final because of the filing of a timely petition for reconsideration, and where the omission of labor protective conditions from the initial order was a result of petitioner's misrepresentations to the Board?

3. Did the Board err in imposing labor protective conditions only upon Western?

4. Is Western's request for review of the arbitration provisions of the Board's order premature, and if not, did the Board err in requiring Western to submit to arbitration in accordance with specific standards prescribed by the Board?

SUMMARY OF ARGUMENT

I

The Board is expressly authorized by the Civil Aeronautics Act to prescribe as a condition to its approval of transfers of certificates of public convenience and necessity, where aircraft properties are

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also transferred, such reasonable terms and limitations as may be required by the public interest. The public interest in uninterrupted and efficient air transportation services obviously is furthered by just and equitable treatment accorded to airline employees. Thus, the prescription of reasonable labor protective conditions clearly falls within the Board's statutory authority, just as the imposition of similar conditions has been held to fall within the authority of the Interstate Commerce Commission. *United States* v. *Lowden,* 308 U. S. 225 (1939).

II

The imposition of the labor protective conditions here involved was lawful and reasonable. The Board retained jurisdiction over its initial order of approval of the transfer by virtue of the timely filing of a petition for reconsideration of that order. Moreover, the initial order of approval omitted prescription of labor protective conditions solely because of the assurances made to the Board by Western's president that no employee would be discharged because of the route transfer. Accordingly, the Board was authorized to amend its order to remedy defects in its initial order of approval which were procured through misrepresentation.

Western voluntarily consummated the transfer agreement prior to the expiration of the time allowed for filing petitions for reconsideration. Western accordingly assumed the risk that labor protective conditions or other changes in the Board's order might subsequently be imposed. The Board acted promptly

to effectuate an informal adjustment of the matter, and promptly reopened the proceeding after these efforts proved futile.

The Board did not err in failing to impose conditions upon United. Only Western's employees were affected by the transfer, and United was not responsible for the delay which occurred in imposing the labor protective conditions. Under the circumstances of this case, it would have been unjust, as the Board found, to have imposed conditions upon United.

Western's objections to the arbitration procedure established by the Board are premature. Western may not find it necessary to resort to arbitration. Moreover, if it does, the Board has retained jurisdiction over the proceeding. Western may appeal to the Board from any unreasonable arbitration award, and may thereafter obtain judicial review of the disposition which the Board makes of that appeal. In any event, the arbitration procedures established accord with the customary procedure utilized by the Interstate Commerce Commission, and are entirely reasonable and proper.

ARGUMENT

I. The Board has authority to impose labor protective conditions upon a certificate and property transfer

The power of the Board to impose conditions upon its approval of a certificate transfer, with or without a transfer of the air carrier properties incident thereto, cannot be seriously questioned. Insofar as the transfer of a bare certificate (*i. e.,* without transfer of air carrier properties) is concerned, section 401

(i) of the Act (52 Stat. 987, 49 U. S. C. 481 (i), p. 3 of Appendix to Pet. brief) provides that such a transfer shall not be approved unless found by the Board to be "consistent with the public interest." The power of the Board to approve or disapprove a certificate transfer includes the implied power to grant approval contingent upon compliance with specified conditions. *Cf. United States* v. *Rock Island Motor Transit,* 340 U. S. 419, 444, 449 (1951); *United States* v. *Resler,* 313 U. S. 57 (1941); *Air Cargo, Inc., Agreement,* 9 C. A. B. 468, 471, 472 (1948); see R. 829, 830.[3]

In instances, such as the present, in which air carrier properties are to be transferred with the certificate, Board approval under Section 408 of the Act (52 Stat. 1001, 49 U. S. C. 488, p. 3 of Appendix to Pet. brief) is also required. This latter section expressly provides that, unless the Board finds that the property acquisition "will not be consistent with the public interest * * * it shall by order, approve [such acquisition] * * * upon such terms and

[3] Actually, it is believed that the Board has express statutory authority to impose conditions upon certificate transfers. Section 401 (a) of the Act (52 Stat. 987, 49 U. S. C. 481 (a)) provides in pertinent part that "no air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing *such* air carrier to engage in such transportation." (Emphasis supplied.) Accordingly, a certificate transfer necessarily must be effecuated by the reissuance of the certificate to the transferee, since otherwise section 401 (a) violations would occur. Such reissuance brings into play the provisions of section 401 (f) (52 Stat. 987, 49 U. S. C. 481 (f)), which expressly authorizes the Board, at the time of issuance of a certificate, to impose "such reasonable terms, conditions, and limitations as the public interest may require."

conditions as it shall find to be just and reasonable and with such modifications as it may prescribe." Thus, the problem here presented is not whether the Board has authority to impose conditions upon certificate and property transfers, which it clearly has, but whether labor protective conditions fall within the ambit of those conditions which the Board is authorized by statute to prescribe.

As the foregoing statutory provisions indicate, "public interest" is the touchstone by which the Board is to be guided in imposing conditions upon certificate and property transfers. The Supreme Court has held that the comparable provisions of the Interstate Commerce Act, which provided for the imposition of those conditions upon railroad mergers and consolidations which were "consistent with the public interest," authorized the Commission to impose labor protective conditions notwithstanding the absence of express statutory authority therefor. *United States* v. *Lowden,* 308 U. S. 225 (1939). The statutory provisions involved in the Lowden Case were substantially identical to the ones here involved.[4]

[4] At the time of the decision in the *Lowden* Case, the Interstate Commerce Act, Section 5 (4) (b) (49 U. S. C. 5 (4) (b) (1939), 48 Stat. 217) provided in part, "if after such hearing the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed consolidation * * * (or) lease * * * will be in harmony with and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3), and will promote the public interest, it may enter an order approving * * * such consolidation * * * (or) lease * * * upon the terms and conditions and with the modifications so found to be just and reasonable."

Moreover, the elements which the Interstate Commerce Commission was required to consider in determining "public interest," subsequently codified in the National Transportation Policy (54 Stat. 899, note preceding section 1 of Title 49 of the United States Code), are almost identical to those factors which the Civil Aeronautics Act requires the Board to consider in determining public interest.[5] Accordingly, the Board clearly possesses authority to impose reasonable labor protective conditions upon a certificate or property transfer.

Western seeks to avoid the controlling effect of the *Lowden* case upon the grounds that the Court was

[5] Section 2 of the Act (52 Stat. 980, 49 U. S. C. 402) provides:

"In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

"(a) The encouragement and development of an air transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

"(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

"(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(e) The regulation of air commerce in such manner as to best promote its development and safety; and

"(f) The encouragement and development of civil aeronautics."

there motivated by the extra-legal consideration of pending legislation in Congress, and that the conditions existing with reference to the railroads do not exist in the air transportation field (Pet. brief pp. 39–42). Neither of these arguments is persuasive, nor do they afford any basis for distinguishing the *Lowden* case. Insofar as the question of pending legislation is concerned, the Court in subsequent decisions has made clear that the amendments to the Interstate Commerce Act which specifically empowered the Commission to impose labor protective conditions merely made mandatory the imposition of such conditions, whereas they had previously been discretionary. *Interstate Commerce Commission* v. *Railway Labor Executives Association,* 315 U. S. 373, 379 (1942); *Railway Labor Executives Association* v. *United States,* 339 U. S. 142, 148 (1950).

In the *Lowden* case, the Court stated (308 U. S. at 239):

> we cannot say that the just and reasonable conditions imposed on appellees in this case will not promote the public interest in the statutory meaning by facilitating the national policy of railroad consolidation; that it will not tend to prevent interruption of interstate commerce through labor disputes growing out of labor grievances, or that it will not promote the efficiency of service which common experience teaches is advanced by the just and reasonable treatment of those who serve.

The major portion of this reasoning is equally applicable to the aviation industry. A stable labor force is as necessary to the uninterrupted functioning in

the public interest of interstate air commerce as the Supreme Court found it to be to interstate rail commerce. Congress has recognized this by specifically making the Railway Labor Act applicable to air carriers.[6] Moreover, it is common knowledge that strikes do occur in the airline industry, with resultant disruption of services peculiarly required at this time by the national defense and public welfare. To prevent a possible strike of air line employees through the imposition of labor protective conditions is to prevent an "interruption of interstate commerce through labor disputes growing out of labor grievances." Moreover, the "just and reasonable treatment of those who serve" the airlines has as direct an effect upon the efficiency of air line operations as similar treatment has upon railroad operations. The Board clearly has discretionary authority to determine, as it did in this case, that the public interest as defined by the Civil Aeronautics Act required the imposition of conditions for the protection of Western's employees.

II. The imposition upon Western of the labor protective conditions here involved represented a lawful and reasonable exercise of the Board's authority

A. It was proper to impose labor protective conditions following the consummation of the transfer since the Board's original order of approval had not become final, and had been procured through misrepresentations by Western to the Board

Western contends that the Board lacked jurisdiction to impose labor protective conditions subsequent

[6] Title II, Railway Labor Act, Section 201 (49 Stat. 1189, 45 U. S. C. 181), section 401 (l) of the Civil Aeronautics Act (52 Stat. 987, 49 U. S. C. 481 (l)).

to its initial approval of the transfer because no express reservation of authority therefor was contained in the initial order. But this contention overlooks the fact that a timely petition for reconsideration was filed by the Air Line Pilots Association (*supra,* p. 4). As in the case of petitions for rehearing in judicial proceedings, a petition for reconsideration of an administrative order serves to retain the agency's jurisdiction over the order of which reconsideration is sought. *Braniff Airways* v. *Civil Aeronautics Board,* 79 App. D. C. 341, 147 F. 2d 152 (1945); *Waterman S. S. Company* v. *Civil Aeronautics Board,* 159 F. 2d 828, 829 (C. A. 5, 1947), *rev'd. on other grounds,* 333 U. S. 103 (1948); *Falwell* v. *United States,* 69 F. Supp. 71 (W. D. Va., 1944), *aff'd.* 330 U. S. 807 (1947); see *United States* v. *Seatrain Lines,* 329 U. S. 424, 432 (1947).

Moreover, the absence of labor protective conditions in the Board's initial order of approval is attributable wholly to the representations which Western made to the Board. Western now contends that its President testified only that "*substantially* all of its personnel" (Br. 30) would be employed elsewhere. However, a reading of the entire testimony (appendix, *infra,* pp. 25–26) will disclose that Mr. Drinkwater unequivocally stated that no employee would be discharged because of the transfer, and that the use of the word "substantially" had reference to general reductions in force which would have been made even if the transfer had not been consummated. Whether this representation was made in good faith or not, the fact remains that

employees were notified in a matter of days after entry of the Board's initial order that they were being furloughed because of the route transfer. Accordingly, and irrespective of the fact that a timely filed petition for reconsideration was pending, the Board had authority to reopen the proceeding because its initial order was procured through misrepresentation. *Westhoven* v. *Public Utilities Commission,* 112 Ohio 411, 147 N. E. 759 (1925); *Smith Bros. Revocation of Certificate,* 33 M. C. C. 465, 472 (1942), *cited with approval, United States* v. *Seatrain Lines, Inc.,* 329 U. S. 424, 432 (1947); cf. *Federal Communications Commission* v. *WOKO, Inc.,* 329 U. S. 223, 227 (1946); *Hazel-Atlas Glass Co.* v. *Hartford Empire Co.,* 322 U. S. 238 (1944). We do not understand that an administrative agency may reexamine an order procured by misrepresentation only where that misrepresentation would support a conviction for perjury.

The situation is nowise altered by the issuance of the Board's order of September 11, 1947, transferring the certificate for Route No. 68. Western contends that this order mandatorily required a consummation of the transfer. This order carried out the voluntary agreement of the parties which provided that the agreement should become effective 21 days after its approval by the Board (R. 12). The Board did not purport to cut down the normal 30-day period for the filing of petitions for reconsideration. And the parties to the agreement could not as a matter of law defeat the right of other parties to request reconsideration, or the power of the Board to reconsider

its approval, by either providing for or consummating the agreement prior to the expiration of the time for reconsideration. *Falwell* v. *United States, supra.*

The basic issues here are whether the Board was entitled to rely upon Western's representations in framing the initial order of approval and whether, if so, the Board was entitled to take corrective action when those representations proved erroneous. Western's precipitous action in furloughing employees almost before the ink was dry on the initial approval order made it possible for the employees affected to file timely petitions for rehearing, and thus prevent the initial approval order from actually becoming final. But the Board's power in the premises should not and does not depend upon this happenstance. If Western had waited the full rehearing period, or had waited a year, before repudiating the assurances it gave the Board, the delay would not deprive the Board of the authority to modify its order in a manner appropriate to meet the evil of Western's making. Section 1005 (d), 52 Stat. 1023, 49 U. S. C. 645 (d).[7] That Western would carry out its assurances in good

[7] Section 1005 (d) provides as follows:

"Except as otherwise provided in this Act, the Board is empowered to suspend or modify its order upon such notice and in such manner as it shall deem proper."

See also Section 205 (a) (52 Stat. 984, 49 U. S. C. 425 (a)) which provides as follows:

"The Board is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this act, as it shall deem necessary to carry out such provisions and to exercise and perform its powers and duties under this act."

faith was an implicit condition of the Board's initial approval; when that faith was breached, the Board had the power and duty to make the condition explicit.

Western complains that it now has little choice but to comply with the Board's order since it is too late to rescind the certificate transfer. This contention overlooks the fact that Western advised the Board that it had no objections to labor protective conditions if the Board deemed such provision advisable[8] and also overlooks the fact that the same situation would exist if Western had refrained from misleading the Board in the first place. In that event, the Board would have included labor protective conditions in the initial order. Once the transfer was effected, Western would have been bound to comply with the provisions. Section 1005 (e) (52 Stat. 1023, 49 U. S. C. 645 (e)).[9] To be sure, Western would have been apprised of the exact nature of the protective provisions at a time when it might still have been able to back out of the transfer agreement. But Western hardly has standing now to complain of the situation in which it finds itself. If knowledge of the labor provisions to be imposed was essential to the decision as to whether to go ahead with the transfer,

[8] Mr. Drinkwater stated (R. 43): "* * * if the Board sees fit and thinks that it has the power to put such [labor] restrictions in any approval, why, we would not object to it, except on the matter of broad principles, as I have just said * * *."

[9] Section 1005 (e) (52 Stat. 1023, 49 U. S. C. 645 (e)), provides as follows:

"It shall be the duty of every person subject to this act, and its agents and employees, to observe and comply with any order, rule, regulation, or certificate issued by the Board under this act affecting such person so long as the same shall remain in effect."

the honorable and prudent course for Western became clear the moment that it realized that its assurances to the Board were in error. It should at once have (1) notified the Board of its new position, and (2) requested delay in effectuation of the certificate transfer until the question of prescription of labor conditions should finally be determined.

Western eschewed this honorable and prudent course. It went ahead with the transfer, and it resisted any effort to have the Board's order modified to protect the employees of Western who were adversely affected by the transfer. Yet Western waited almost three years, until September 22, 1950 (R. 860–1), to raise before the Board any challenge to the power of the Board to attach conditions after consummation of the transfer. We submit that in these circumstances Western must be deemed to have assumed the risk that its conduct so plainly created.

Western is in no position to contend that an unreasonable period of time elapsed between the initial order of approval and the final order prescribing conditions. As heretofore indicated, the Board took prompt action to reach a voluntary settlement of the matter, which came to naught. When this fact became apparent, the Board promptly reopened the case (*supra,* p. 6). The delays after reopening were the normal ones resulting from requests for extensions of time, of which Western made its share.[10]

[10] The Board's actions in attempting to reach a voluntary settlement of the controversy are detailed at pp. 5–6, *supra.* Proceedings following the Board's order of August 25, 1948, reopening the case were as follows: A prehearing conference was held on Octo-

Thus, the Board proceeded with "reasonable dispatch" to conclude the matter presented to it having "due regard * * * for the convenience and necessity of the parties or their representatives" (Administrative Procedure Act, Section 6 (a), 60 Stat. 240, 5 U. S. C. 1005 (a)).[11]

A situation thus existed in which Western was fully aware at all times that a substantial likelihood existed that reconsideration of the Board's initial order of approval would be sought and obtained.

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ber 11, 1948, and a report of that conference issued on October 15, 1948. On October 24, 1948, Public Counsel requested further exhibits. A deadline for the exchange of exhibits was tentatively set for December 13, 1948, and hearing planned for January 10, 1949. The January hearing was initially postponed at the request of Public Counsel. Western's counsel requested additional time for the preparation of its exhibits, rebuttal exhibits, and delays in the hearing date in letters to Examiner Wrenn dated December 2, 1948, January 6, 1949, June 21, 1949, August 11, 1949, and September 30, 1949. Hearing was held on November 14, 1949. Western thereafter by letter dated March 21, 1950, requested a delay in the hearing of oral argument before the Board. Argument was held May 8, 1950. The Board's opinion and order in the reopened proceeding was entered July 7, 1950. Western then requested and was granted an extension of time within which to petition for reconsideration and actually filed such petition on September 22, 1950.

The above facts are not of record herein, but cannot be questioned, and are essential to any resolution of the issues raised by Western in Point III of its argument (Br. 34).

[11] In any event, we do not understand that a failure to proceed with "reasonable dispatch" in and of itself has the effect of vitiating otherwise valid administrative action. On the contrary, the requirement of "reasonable dispatch" contained in section 6 (a) of the Administrative Procedure Act obviously has relation to the power conferred upon courts by section 10 (e) thereof to compel "agency action unlawfully withheld" (60 Stat. 243, 5 U. S. C. 1009 (e)).

Yet Western voluntarily proceeded to consummate the transfer and thereafter contributed in large measure to the delays incident to the ultimate prescription of conditions. In the light of these facts, it is apparent that the Board's action was reasonable and proper.

B. The Board did not err in imposing labor protective conditions only upon Western

Western also complains because the labor protective conditions prescribed are applicable only to Western and not to United. However, Western has pointed to no legal requirement or administrative practice which compels the imposition of such conditions upon all parties to a route transfer proceeding. On the contrary, Western's primary argument is that United should have shared in the responsibility for the protection of Western's employees in that United was the principal financial beneficiary of the transaction. The record and the Board's findings approving the transaction do not support this conclusion. Further, if it were true, this fact would not be dispositive of the question. Western alone determined to sell in this case, and only Western's employees required protection. As the Board found, the imposition of conditions upon United would have been unfair after the transaction had been consummated (R. 833, 834). On the other hand, the delay in imposition of labor protective conditions was wholly attributable to Western, *supra,* p. 3. Accordingly, no injustice or abuse of discretion resulted from the imposition of these conditions only upon Western.

C. Western's objections to the arbitration provisions of the Board's order are premature; moreover, the provisions imposed are reasonable and proper

Western's final complaint is that the Board erred both in requiring Western to submit to arbitration for the purpose of resolving disputed questions concerning the identity of employees adversely affected and the amount of compensation due them, and in failing to provide for an appeal from the arbitration award. These contentions overlook the facts that there need not be any arbitration at all unless Western finds that it cannot reach agreement with its former employees (R. 844), and that the Board retained jurisdiction over the proceeding to prescribe the method of selecting the arbitration tribunal and the rules under which arbitration would be conducted (R. 845). Further, the Board retained general jurisdiction over the proceeding "for the purpose of modifying or clarifying any provisions of [its] order and for the purpose of imposing from time to time such other or further terms and conditions as to the Board may seem just and reasonable" (R. 847).

Accordingly, we submit that Western's complaint on this score is premature. It may never be necessary to resort to arbitration. Moreover, if arbitration is required, the Board has reserved jurisdiction over the details thereof. If an improper or unconscionable arbitration award is made, Western is at liberty to request the Board for relief therefrom. Whether such a request would be entertained is not now material. Review may be sought at that time of the Board's action upon such a request, and any

abuse of discretion on the part of the Board may then be corrected.

In any event, the Board clearly did not err in imposing requirements for arbitration upon Western. A detailed formula to be applied in determining compensation due to adversely affected employees was prescribed by the Board (R. 868–871), and the application of that formula is essentially a ministerial task. The arbitration procedure prescribed by the Board accords with customary procedure for settling labor disputes and further accords with the procedure prescribed by the Interstate Commerce Commission in the so-called Burlington formula which the Commission has employed in imposing labor protective conditions. *Chicago, Burlington, Quincy Railroad Abandonment,* 257 I. C. C. 700 (1944); *Oklahoma Ry. Co. Trustees Abandonment,* 257 I. C. C. 177 (1944). If this type of delegation of authority by resort to arbitration had not been intended by Congress, it is only reasonable to suppose that it would long since have been prohibited by the Interstate Commerce Act. Obviously an agency such as the Board is not required to immerse itself in the minute details of ascertaining all facts relating to all possibly affected employees in transfer cases or to ascertain for itself the precise monetary losses suffered by such employees. Moreover, as previously stated, Western may obtain either a review from the Board of an arbitration award and ultimate judicial review of the Board's decision, or immediate judicial review of any refusal by the Board to review an arbitration award.

CONCLUSION

Upon the basis of the foregoing reasons and authorities, the Board's orders should be affirmed.

Respectfully submitted.

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James L. Highsaw, Jr.,
Chief, Litigation and Research Division, Civil Aeronautics Board.

O. D. Ozment,
Charles H. Resnick,
Attorneys, Civil Aeronautics Board.

October 1951.

APPENDIX

Testimony of Terrell C. Drinkwater, President of Western Air Lines (R. 41–45)

Q. Turning to the question of the use of the personnel employed on route 68.

A. Yes, question 8 on page 10.

Q. Is that page 10?

A. Yes.

Q. When you say there that you intend to absorb substantially all of the personnel, I just wondered why the qualification.

A. Of substantially?

Q. Yes.

A. Because we have too many people in most places in Western Airlines, and we are trying to reduce our overhead, and reduce the number of employees wherever we can. I did not want to say that we would absorb them all because as we get further into the situation, we may find we have too many folks, but generally speaking we know we will need at least 14 flight crews to fly between San Francisco and Seattle, to say nothing of Mexico City. We know we will [267] need larger station complement at Portland, for instance, than we have at Grand Junction, and we know we will need station personnel at Seattle, in number and experience and classifications which will certainly be analogous to our present personnel in Denver.

Q. You estimate what percentage of your personnel will probably be taken over?

A. Percentage of what personnel?

Q. The personnel on route 68 now.

A. You mean Denver, Grand Junction and the pilots?

Q. Yes.

A. All of the flight crews, 100 percent of the flight crews, and I suppose, well, everybody in Grand Junction who wants a job, we are going to give them a job, and everybody in Denver who wants a job that is a competent person, is going to get a job. We have to leave some people in Denver to operate Inland Airlines, of course. But aside from the general reduction in personnel which is still going on in Western Airlines, we would take care of all of these people.

Q. Would this reduction in the personnel on route 68 be made regardless of whether the sale were approved?

A. Yes. It is the same program that is going on on routes 13, 19, 63, 52, and 6.

Q. Then actually you intend to absorb all of the personnel that you would have kept anyway?

A. Subject to that qualification, yes.

Q. If you are unable to absorb any of the personnel who might be left jobless as the result of this sale, do [268] you have any plans with respect to taking care of that personnel?

A. Well, there won't be any. The last question covers that.

Q. Well, you have no plans, then, because you don't contemplate any?

A. That is right. As a matter of fact, we will need more people probably. I am sure we will need more people. We will need more people to staff up in Portland and Seattle than we presently have in Denver and Grand Junction, let us put it that way.

Q. Have you discussed with United at all the question of taking over any of Western's personnel?

A. No.

Q. How would you feel about the Board putting conditions on any order of approval that it might issue relating to severance pay and cost of people moving who might be dropped as the result of this route transfer?

A. Well, I would not think that the Board would care to state how many employees an airline should have at a given station. It seems to me that would be a matter within the discretion of management of an airline.

But if the Board sees fit and thinks that it has the power to put such restrictions in any approval, why, we would not object to it, except on the matter of broad principles, as I have just said, that I don't think that the Board should undertake to tell each carrier how many people they should put at each station or for what purpose.

Examiner WRENN. Is that what you meant, or did you [269] have reference to personnel who might want to be transferred, and there would be moving expense?

By Mr. HIGHSAW:

Q. I have both in mind.

A. We pay the moving expenses. Every airline in the country does that. When you transfer them, you pay their moving expenses.

Q. With respect to any personnel that was dropped as the result of the route sale, you don't think the Board should put any restrictions on that, but you would accept them if any conditions were put in.

A. Well, it depends on what they were, but the question is entirely academic because there are not going to be any personnel dropped as the result of route sale. There may be some dropped because they

are incompetent, or we have too many folks, but not any dropped because of the route sale.

Q. These questions that I have regarding the balance sheet, and everything, I assume it would be more profitable to go into those with Mr. Taylor.

A. Yes.

Mr. HIGHSAW. I believe that is all, Mr. Examiner.

Examiner WENN. Airline Pilots Association, do you have any questions?

Cross-examination by Mr. MUNCH:

Q. This may seem repetitious in view of what has been brought out, but what now is your position regarding the pilots on this division? [270]

A. As this statement here reads, Mr. Munch, we have every intention of keeping every one of the 14 flight crews presently operated on route 68 in the event the Board approves this transaction, and transferring them, subject to their seniority list and their rights to bid, to the extended operation of route 62, San Francisco-Portland-Seattle.

I have had a series of meetings with all of our pilots, three different meetings, in order to meet with everybody in the flight department, and have gone over this whole thing carefully with them, and explained that if the Board granted our extension of route 63 to Seattle, that was our intention.

There was no question raised about that program in the event that the Board granted that extension.

The Board yesterday did grant it, so I assume that takes care of your question.

Q. In other words, there are more or less guarantees.

A. That is true, and as a matter of fact, we will need more flight crews than the 14. [271]

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